80-1113

Supreme Court, U. S.
FILED
DEC 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

JANUARY TERM, 1981

Case No.: _____

BYRON PETER ATHANASIOU and
PETER JAMES ELLIOTT

*Petitioners,*

*—vs—*

THE STATE OF NEW JERSEY

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, APPELLATE DIVISION**

MAURICE GRAHAM of
BRIMMELL & GRAHAM P.A.
2161 E. Commercial Blvd.,
Ft. Lauderdale, Fla. 33308
Telephone: (305) 776-7500

## QUESTIONS PRESENTED

1. WERE THE PETITIONERS DENIED THEIR FUNDAMENTAL RIGHTS UNDER THE FOURTH AMENDMENT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES WHEN THEY WERE STOPPED IN THEIR MOTOR VEHICLE BY A LAW ENFORCEMENT AGENT FOR A RANDOM VEHICLE CHECK WITHOUT PROBABLE CAUSE THAT ANY LAW WHATSOEVER WAS BEING VIOLATED.

2. SHOULD THIS COURT'S HOLDING IN DELAWARE V. PROUSE, 440 U.S. 648 (1979) BE TREATED AS ANNOUNCING A NEW VARIANT TO THE EXCLUSIONARY RULE OR AS A CLARIFICATION OF THE ALREADY EXISTING PARAMETERS OF THE EXCLUSIONARY RULE AS ANNOUNCED BY THIS COURT IN UNITED STATES V. MARTINEZ-FUERTE, 428 U.S. 543 (1976); UNITED STATES V. BRIGNONI-PONCE, 422 U.S. 873 (1975); TERRY V. OHIO, 392 U.S. 1 (1968).

3. SHOULD DELAWARE V. PROUSE BE APPLIED RETROACTIVELY TO CASES WHICH WERE PENDING BEFORE THE TRIAL COURT WHEN SAID OPINION WAS ANNOUNCED PRIOR TO ACTUAL TRIAL OF PETITIONERS AND WHEN PETITIONERS RAISED THE QUESTION OF THEIR FOURTH AMENDMENT RIGHTS AND THE PROUSE DECISION AT THE EARLIEST POSSIBLE OPPORTUNITY BY A MOTION TO SUPPRESS THE EVIDENCE.

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1981

CASE No.:

**BYRON PETER ATHANASIOU and**
**PETER JAMES ELLIOTT**

*Petitioners,*

*—vs—*

**THE STATE OF NEW JERSEY,**

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI**
**SUPERIOR COURT OF THE STATE OF**
**NEW JERSEY, APPELLATE DIVISION**

---

Petitioners, Byron Peter Athanasiou and Peter James Elliott, seek to have this Court issue its Write of Certiorari to the Superior Court of New Jersey, Appellate Division, to review the decision of that Court affirming the conviction of Petitioners which occurred before the Superior Court of New Jersey — Law Division.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINION BELOW | 5 |
| JURISDICTION | 6 |
| QUESTIONS PRESENTED | 6 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 4 |
| STATEMENT OF CASE | 4-5 |
| REASON FOR GRANTING WRIT | 7 |

1. The Petitioners were merely motorists who were not observed violating any law whatsoever but who were stopped nonetheless for a random vehicle check by the officer in question in violation of Petitioners' Fourth Amendment and Fourteenth Amendment rights.

2. Whether the principles announced in Delaware v Prouse by this Court were applicable to the to the Petitioners' case before the trial court or the Superior Court of New Jersey, Appellate Division.

CONCLUSION 12

APPENDIX

1. Decision of the Superior Court of New Jersey Appellate Division. A-1 to A-3
2. Decision of the Supreme Court of New Jersey A-4.

## TABLE OF AUTHORITIES


| Cases: | PAGE |
|---|---|
| ***Brinegar v United States***<br>388 U.S. 106 (1949). | 8 |
| ***Delaware v Prouse***<br>440 U.S. 648 (1979). | 10 |
| ***Terry v Ohio***<br>392 U.S. 1 (1968). | 8 |
| ***United States v Brignoni-Ponce***<br>422 U.S. 873 (1975). | 8 |
| ***United States v Diaz***<br>515 F.2d 892 (5th Cir. 1975).<br>Cert. den., 423 U.S. 1052) | 11 |
| ***United States v DiRe***<br>332 U.S. 581 (1948). | 8 |
| ***United States v Martinez-Fuerte***<br>428 U.S. 543 (1976). | 8 |
| ***United States v Morison***<br>546 F.2d 319 (9th Cir. 1976). | 9 |

## CONSTITUTIONAL PROVISIONS INVOLVED

### AMENDMENT FOUR

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT FOURTEEN

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

## STATEMENT OF THE CASE

### A. HISTORY

The Petitioners were indicted on the 30th of May, 1979 in Passaic County, Indictment No. 580-79 and they were charged in two counts, the first count being possession of marijuana, and the second count being possession of marijuana with the intent to distribute marijuana. Subsequently, the Petitioners entered a plea of not guilty and filed a Motion to Suppress the physical evidence, the marijuana, which was taken from the motor vehicle which Petitioners were occupying when they were stopped for a random vehicle check. The trial court denied Petitioners' motion and an Order to this effect was entered.

On January 14, 1980, Petitioners entered retraxit pleas of guilty to Count Two in return for the dismissal of Count One; Petitioners further expressly reserved the right to appeal the

trial Court's denial of their Motion to Suppress. The trial court's denial of Petitioners' Motion to Suppress was appealed to the Superior Court of New Jersey, Appellate Division and said court affirmed the trial court's determination.

## B. FACTS.

Petitioners were travelling on the Garden State Parkway, northbound in the City of Clifton, when they were stopped by New Jersey State Police Trooper William Bergen for a random vehicle check. Bergen stated that he did not stop the Petitioners with the intent to issue any traffic citations. No evidence was ever shown that would have indicated that the officer ever had an articulable and reasonable suspicion that Petitioners were unlicensed motorists or that the motor vehicle itself was either improperly registered or in need of a valid vehicle inspection sticker, or that he thought either of the Petitioners were subject to arrest for violation of the law.

After the officer stopped Petitioners' vehicle he instructed Petitioners to open the trunk of their vehicle, where he discovered the marijuana. At no time did either Petitioners give the officer permission to search the vehicle nor did the officer ever request said permission. The officer testified that during his five years as a State Trooper he had stopped numerous cars for travelling 50 m.p.h. in a 55 m.p.h. zone (such as Petitioners) and he has never obtained a search warrant in any case he has been involved in.

Although Officer Bergen stated that he obstensibly stopped Petitioners because their vehicles's tires appeared to be low, he further stated that he wanted their trunk opened because he assumed that he might find marijuana in it.

## OPINION BELOW

The decision of the Superior Court of New Jersey, Appellate Division, which affirmed the trial court's denial of Petitioners' Motion to Suppress was by virtue of a non-published opinion

which is contained in the Appendix to this Petition at A.1-3. A timely Petition for Certification was filed in the Supreme Court of the State of New Jersey and said petition was denied on September 30th, 1980, published at N.J., A.2d (1980), a copy of which is contained in the Appendix to this Petition at A.4.

## JURISDICTION

The judgment of the Superior Court of New Jersey, Appellate Division, was entered on the 1st day of July, 1980. A timely Petition for Certification was filed before the Supreme Court of the State of New Jersey, and, was denied on the 30th day of September, 1980. The jurisdiction of this Court to review the decision of the Superior Court of New Jersey, Appellate Division is invoked pursuant to Title 28 U.S.C. § 1257(3).

## QUESTION PRESENTED

1. WERE THE PETITIONERS DENIED THEIR FUNDAMENTAL RIGHTS UNDER THE FOURTH AMENDMENT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES WHEN THEY WERE STOPPED IN THEIR MOTOR VEHICLE BY A LAW ENFORCEMENT AGENT FOR A RANDOM VEHICLE CHECK WITHOUT PROBABLE CAUSE THAT ANY LAW WHATSOEVER WAS BEING VIOLATED.

2. SHOULD THIS COURT'S HOLDING IN ***DELAWARE V PROUSE***, 440 U.S. 648 (1979) BE TREATED AS ANNOUNCING A NEW VARIANT TO THE EXCLUSIONARY RULE OR AS A CLARIFICATION OF THE ALREADY EXISTING PARAMETERS OF THE EXCLU-

SIONARY RULE AS ANNOUNCED BY THIS COURT IN UNITED STATES V. MARTINEZ-FUERTE, 428 U.S. 543 (1976); UNITED STATES V. BRIGNONI-PONCE, 422 U.S. 873 (1975); TERRY V. OHIO, 392 U.S. 1 (1968).

3. SHOULD DELAWARE V. PROUSE BE APPLIED RETROACTIVELY TO CASES WHICH WERE PENDING BEFORE THE TRIAL COURT WHEN SAID OPINION WAS ANNOUNCED PRIOR TO ACTUAL TRIAL OF PETITIONERS AND WHEN PETITIONERS RAISED THE QUESTION OF THEIR FOURTH AMENDMENT RIGHTS AND THE PROUSE DECISION AT THE EARLIEST POSSIBLE OPPORTUNITY BY A MOTION TO SUPPRESS THE EVIDENCE.

The trial court denied Petitioners' Motion to Suppress the physical evidence and Petitioners changed their plea to guilty on possession of marijuana with an expression reservation reserving their right to appeal the trial court's denial of their Motion to Suppress. Appeal to the Superior Court of New Jersey, Appellate Division and affirmance of the trial court's ruling followed.

## REASONS FOR GRANTING THE WRIT

1. The Petitioners were merely motorists who were not observed violating any law whatsoever but who were stopped nonetheless for a random vehicle check by the officer in question in violation of Petitioners' Fourth Amendment and Fourteenth Amendment rights.

The trial court and the lower Appellate Court affirmatively found that Petitioners did not have the right to raise their Fourth Amendment challenge to the search of their vehicle from which the contraband was seized. Petitioners' Fourth

Amendment challenge was cast aside by the Superior Court of New Jersey, Appellate Division, where it held that;

> "The charges arose out of Trooper Bergen's stop of defendants' motor vehicle on the Garden State Parkway on February 24, 1979, prior to the decision in *Delaware v. Prouse*, 440 *U.S.* 648, 99 *S.Ct.* 1391, 59 L.Ed 2d 660 (1979). Since our Supreme Court has held that the *Delaware v. Prouse* rule should be applied prospectively only, *State v. Carpentieri*, N.J. (Docket No. A-122-79, decided May 19, 1978), we need not consider the first issue raised by defendant, namely, whether the stop in question was a "random stop" prescribed by *Delaware v. Prouse,"* (A.2).

Simply stated, the State Appellate Court ruled that the Petitioners had no right to enforce their Fourth Amendment rights against unreasonable searches and seizures because the incident in question occurred prior to this Court's ruling in ***Delaware v. Prouse***.

This decision by the New Jersey Appellate Court, sought to be reviewed, has failed to take into consideration all of the additional case law presented to it and is in direct and patent conflict with this Court's decision in ***United States v. Martinez-Fuerte***, 428 U.S. 543 (1976); ***United States v. Brignoni-Ponce***, 422 ***U.S.*** 873 (1975); ***Terry v. Ohio***, 392 U.S. 1 (1968); ***Brinegar v. United States***, 388 U.S. 160 (1949); and, ***United States v. DiRe***, 332 U.S. 581 (1948). In the ***Brinegar*** case, this Court stated that:

> . . .the citizen who has given no good cause for believing he is engaged in that sort of activity (transporting contraband) is entitled to proceed on his way without interference. But one who recently and repeatedly has given substantial ground for believing that he is engaged in the forbidden transportation in the area of his usual operations has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs.

> This does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion. (at page 1311).

The Petitioners were travelers from the State of Florida, the officer had no good cause for believing they were transporting contraband and the officer who stopped the Petitioners had no way to know at the time he stopped the Petitioners that they were not going about their legitimate affairs. The officer herein stopped the Petitioners' vehicle based only upon his whim, caprice or mere suspicion. It is intolerable and unreasonable to condone a law enforcement officer's stopping of automobiles on the mere chance of finding contraband and subjecting persons who are lawfully using the highways to the indignity of such a search in violation of the Fourth Amendment. This action was hardly a "good faith" effort by a police officer; rather it was an intentional abuse of power based on a pretext in a knowing attempt to circumvent the petitioners constitutional rights.

It has been held in the case of ***United States v. Morrison***, 546 F.2d 319 (9th Cir. 1976), that:

> When a law enforcement officer signals a motorist to stop by use of a siren or red light, there has been a seizure which must be justified under the Fourth Amendment. *United States v. Ward*, 448 F.2d 162 (9th Cir. 1973) (In banc); *Carpenter v. Sigter*, 419 F.2d 169 (8th Cir. 1969). The seizure occurs when the officer first communicates the command to halt. The command must be valid when given; . . .*United States v. DiRe*, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed 210 (1948).

The Petitioners were driving a three year old vehicle and were proceeding at fifty miles per hour in a fifty-five miles per hour speed zone. This officer said the car was riding low and that the tires appeared to be in need of further inflation. These were the factors given by the Officer to justify his seizure of the Petitioners, their vehicle and his subsequent search. The

officer had no basis at all upon which to have a reasonable suspicion that illegal activity was afoot; there was no idicia of illegal activity present and thus the stopping of Petitioners constituted an illegal, unconstitutional seizure under the Fourth and Fourteenth Amendments to the Constitution of the United States. ***United States v. Brignoni-Ponce***, 442 U.S. 873 (1975).

The seizure and resultant search made by Officer Bergen was violative of the Fourth and Fourteenth Amendments and the decisions of this Court and the Circuit Courts. On this basis and on the foregoing argument Petitioners maintain that review of the Superior Court of New Jersey, Appellate Division's decision is mandated and a reversal is required.

2. Whether the principles announced in ***Delaware v. Prouse*** by this Court was applicable to the Petitioners' case before the trial court or the Superior Court of New Jersey. Appeallate Division.

This Court held in ***Delaware v. Prouse***, 440 U.S. 648 (1979), that a random stop of a motorist is per se unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution. In that case the arresting officer stopped the vehicle although he had not seen anything suspicious. The officer walked toward the vehicle, smelled marijuana and found marijuana on the floor of the vehicle as he was checking documentation. In upholding the Delaware Court's decision this Court stated that:

> Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth amendments, even though the purpose of the stop is limited and the resulting detention is quite brief.

This Court further held that unless there is a reasonable suspicion of a violation of law, a police officer may not stop and/or detain a motor vehicle and its occupants; that the motoring public,

> . . .may not. . .have their travel and privacy interfered with at the unbridled discretion of police officers.

In the instant case the arresting officer admitted responding before the trial court that Appellants had not violated the law at the time the vehicle was pulled over. He stopped the Appellants and actively engaged in looking for possible violations of the law; he was not merely attempting to verify the driver's license and the vehicle's registration. This type of indiscriminate probing into the motoring public's right to travel in privacy without fear of unreasonable, unwarranted and intolerable searches and seizures cannot be tolerated regardless of the outcome of any search initiated by the unbridled and groundless discretion of police officers. The meager circumstances testified to by the arresting officer are so uncertain and indifinite that they fail to constitute lawful circumstantial evidence. Compare: ***United States v. Diaz***, 515 F.2d 892 (5th Cir. 1975), cert den., 423 U.S. 1052.

On this basis the Petitioners maintain that review of the Superior Court of New Jersey, Appellate Division's decision is mandated and a reversal is required.

## CONCLUSION

WHEREFORE, in light of the foregoing circumstances and authorities cited therein, the Petitioners respectfully request the judgment of the Superior Court of New Jersey, Appellant Division be reversed and this Court issue a Petition for Writ of Certiorari.

Respectfully submitted,

by: Maurice Graham

Maurice Graham Esq.,
Brimmell & Graham P.A.,
2161 E. Commercial Blvd.
Ft. Lauderdale, Fla. 33308
Telephone: (305) 776-7500

Certify to: State of New Jersey LORANE L. POSNER, Deputy Att'y
PO Box CN 24 Princeton, New Jersey 08540
Honorable Wade H. McCree, Jr., Solicitor General,
Department of Justice, Washington, D.C. 20530. this Dec 26, 1

By: Maurice Graham

# APPENDIX

1. Decision of the Superior Court of New Jersey, Appellate Division A-1 to A-3.

2. Decision of the Supreme Court of New Jersey. A-4.

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2227-79-A

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BYRON PETER ATHANASIOU and
PETER JAMES ELLIOTT,

Defendants-Appellants.

---

Submitted July 1, 1980--Decided JUL 14 1980

Before Judges Botter and Morgan.

On appeal from Superior Court, Law Division,
Passaic County.

Stern, Lavinthal & Ackerman, attorneys for appellants
(Alan R. Ackerman, of counsel and on the brief).

John J. Degnan, Attorney General, attorney for respondent
(Lorane L. Posner, Deputy Attorney General, of counsel and
on the brief).

PER CURIAM

The sole issue on this appeal is whether Trooper Bergen made a valid warrantless search of the trunk of defendant's vehicle in which 360 pounds of marijuana were found. Defendants' motion to suppress the evidence was denied, and defendants entered guilty pleas to the second count of the indictment which charged possession with intent to distribute a controlled dangerous substance contrary to N.J.S.A. 24:21-19(a)(1). Each defendant was sentenced to State Prison for a term of two to three years and each was fined $10,000. This appeal followed.

The charges arose out of Trooper Bergen's stop of defendants' motor vehicle on the Garden State Parkway on February 24, 1979, prior to the decision in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979). Since our Supreme Court has held that the Delaware v. Prouse rule should be applied prospectively only, State v. Carpentieri, ___ N.J. ___ (Docket No. A-122-79, decided May 19, 1980), we need not consider the first issue raised by defendant, namely, whether the stop in question was a "random stop" proscribed by Delaware v. Prouse.

On the evidence presented the trial judge found that the search of the trunk was based on probable cause obtained when the police officer detected a strong odor of marijuana emanating from the passenger compartment of the vehicle and also observed various marijuana seeds on the floor of the vehicle. The trial judge also found as a fact that the driver consented to the search of the trunk after being advised that he did not have to give his consent. On the evidence presented, the trial judge could properly make these findings, and we must accept them as having support by credible evidence. State v. Johnson, 42 N.J. 146, 162 (1964).

The search of the trunk having been made with the consent of the vehicle's driver in keeping with the requirements of State v. Johnson, 68 N.J. 349, 353-354 (1975), the trial judge properly denied the motion to suppress evidence. Although this conclusion makes it unnecessary to decide the issue concerning probable cause raised by defendants, it would appear that the trial judge's finding of probable cause is not inconsistent with State v. Patino, ___ N.J. ___ (Docket No. A-17-79, decided May 19, 1980) aff'g

163 N.J.Super. 116 (App.Div. 1978). See State v. Kahlon, 172 N.J.Super. 331, 338 (App.Div.1980).

Affirmed.

A TRUE COPY

Elizabeth M. McLaughlin

Clerk

SUPREME COURT OF NEW JERSEY
C-79 SEPTEMBER TERM 1980

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRYON PETER ATHANASIOU & PETER JAMES ELLIOTT,

Defendants-Petitioners.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2227-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 30th day of September, 1980.

Clerk

dp

FILED
SUPREME COURT
OCT 8 1980

Clerk

A TRUE COPY